IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

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PUERTO RICO

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Statement.

The case comes before this Court on a writ of certiorari granted on petition of the Treasurer of Puerto Rico, the defendant below. The writ was directed to the Circuit Court of Appeals for the First Circuit to review the judgment of that Court entered July 13, 1938, vacating the judgment of the Supreme Court of Puerto Rico in favor of the defendant entered July 28, 1936, and remanding the case to that court for further proceedings not inconsistent with the opinion of the Circuit Court.

The opinion of the Supreme Court is reported in 50 D. P. R. 962 (Spanish ed.) and on reconsideration in 51

D. P. R. 135 (Spanish ed.). The opinions of the judges of the Circuit Court are reported in 98 F. (2d) 398-404. The three opinions of the Supreme Court of Puerto Rico in *Porto Rico Fertilizer Company* v. *Domenech*, upon which its opinion in this case was based, are attached hereto as Appendix B.

Nature of the Action.

The action was brought in the District Court of San Juan by Yabucoa Sugar Company as plaintiff, against the Treasurer of Puerto Rico, as defendant, to recover an overpayment of income tax in the sum of $6,803.66, plus interest. The plaintiff had filed a claim for credit or refund with the Treasurer within four years after payment, as provided by law, which had been denied by the Treasurer and allowed by the Board of Review and Equalization on appeal (Complaint R., 1-6).

The District Court dismissed the complaint on demurrer, on the ground that the tax had not been paid under protest according to Section 76 (a) of the Income Tax Law and that there was no remedy by suit (R., 14). The judgment of the District Court was affirmed by the Supreme Court of Puerto Rico on the grounds (1) that no protest had been made at the time of payment and (2) that taxpayer may not resort to the courts from the decision of the Treasurer (R., 20-22). The respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment of the Supreme Court, and remanded the case for further proceedings (R., 37).

The sufficiency of the facts to state a cause of action, other than the fact that the tax had not been paid under protest, was not considered or passed on in any court below.

The action was not an appeal from the decision of the Treasurer as stated by Petitioner (Brief 1) but an original action at law.

Questions Presented.

The fundamental question involved is whether a taxpayer, who has calculated and paid his Puerto Rican income tax on the basis of such calculation, as required by law, and filed a claim for credit and refund of an overpayment with the Treasurer within four years after payment as permitted by law, has *any* recourse to the courts after denial of his claim by the Treasurer. The Supreme Court of Puerto Rico held *without qualification* that the respondent "is without remedy by suit" on the theory that "this is a discretional matter with the Treasurer," and, furthermore, that "by legislative enactment a payment under protest is a condition precedent to recovery by suit" (R., 21).

The questions presented are therefore:

First: Is the taxpayer without *any* recourse to the courts if the Treasurer denies his claim for credit or refund of an overpayment?

Second: Is payment under protest an essential condition precedent to bringing suit?

Third: Assuming that the taxpayer may bring suit to recover, did the Respondent properly present his case befor the court?

(1) Had the Board power to reinvestigate the facts or pass only on questions of law?

(2) Will the Puerto Rican courts accept the facts as found by the Treasurer or by the Board of Equalization on appeal, as correct, and investigate only whether the law has been correctly applied to the facts, or is the matter heard on trial of facts and law?

(3) Has the complaint in this case stated a cause of action?

Fourth: Is the decision of the Supreme Court of Puerto Rico clearly wrong?

Facts.

The facts alleged in the complaint, and admitted for the purposes of the demurrer, are as follows:

That for the taxable year 1927 plaintiff filed its income tax return showing a taxable income of $201,897.29 and paid $25,234.92 as income tax; that the defendant notified a deficiency assessment of $1301.51, that complainant appealed therefrom to the Board of Review and Equalization; that the Board accepted all items specified in the notice of deficiency except an item for repairs, and admitted on that account the total amount appearing on the books of plaintiff less $18,208.78; that the total amount appearing on the books was $133,700.61 from which item $18,208.78 was stricken as improvements, leaving a balance of $115,491.83; that as per the notice of deficiency the defendant had accepted $51,216.65 deduction for repairs, which resulted in a net additional deduction for repairs of $64,275.18, entitling complainant to a refund of $6,803.66; that complainant filed a claim for credit and refund of said $6,803.66 with defendant, of which $525.56 was granted. That complainant again appealed to the Board which affirmed its original ruling.

That the Treasurer of Puerto Rico in granting to the plaintiff a refund of $525.56 plus $60.61 for interest, instead of $6,803.66, "has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so" (R., 6).

Contentions of Respondent.

On the First Question Presented (see "Questions Presented" supra, p. 3), respondent maintains that the taxpayer is given a remedy by suit and that, in arriving at the opposite conclusion, the Supreme Court of Puerto Rico erred (1) in its major premise, namely that this is a *discretional* matter with the Treasurer, (2) in holding that the provisions of Section 76 (a) of the Income Tax Law of 1924 are applicable, and (3) in failing to apply the provisions of 76 (b) of the Law.

On both essential points, namely that this is not a discretional matter and that section 76 (a) is not applicable, all three judges of the Circuit Court of Appeals (R., 24-36) disagree with the Supreme Court and the petitioner himself has either agreed with the Circuit Court or conceded (Brief, 25, 37, 38 and footnote).

The contention, however, of the petitioner is that while the Treasurer is charged with the duty of passing on claims for refund he is only "bound by the rules of fair play applicable to all hearings and decisions of administrative tribunals" (Brief, 39), and that after a "full and fair" (Brief, 3) hearing has been accorded and after the Treasurer has performed his duty "to judge the merits of the claim" (Brief, 39) and has thus judged and decided it, then the taxpayer "has no appeal to the courts from the Treasurer's decision. It is final" (Brief, 39). The contention, in other words, is that the Treasurer, an interested administrative official, is the *sole* and final judge of what are "the rules of fair play", of what is a "full and fair" hearing, and of what are the merits of the claim. Petitioner concedes that a mandamus would lie (Brief, 38, footnote).

The limitations conceded by the petitioner are not conceded by the Supreme Court of Puerto Rico in its opinions.

On the Second Question Presented (see "Questions Presented" supra, p. 3), respondent maintains that no protest is required as a condition precedent to suit and that the court erred in applying section 76 (a) of the Income Tax Law of 1924; and in failing to apply principles of the Civil Law and its own previous decisions.

On the Third Question Presented (see "Questions Presented" supra, p. 3), assuming that the taxpayer may resort to the courts, the question has been raised in this court for the first time as to the sufficiency of the pleadings. Respondent maintains:

(1) That the Board of Review and Equalization had full power to investigate the facts independent of the determination of the Treasurer, and modify the return accordingly.

(2) That in a suit to compel the Treasurer of Puerto Rico to return amounts unduly paid as Income Tax, the matter is tried on the facts and law.

(3) That in view of the determination by the Board the burden was on the Treasurer to raise questions of fact by answer.

(4) That whether or not the facts alleged in the complaint on the merits were sufficient to state a cause of action, was not passed upon in any court below and should not be raised originally in this court.

On the Fourth Question Presented (see "Questions Presented" supra, p. 3), Respondent maintains that the decision of the Supreme Court of Puerto Rico was clearly erroneous.

Statutes Involved.

For the convenience of the Court the pertinent provisions of the following statutes are printed as an appendix to this brief (Appendix A):

Sections 34, 37, 39, 54, 57, 58, 59, 60, 61, 62, 63 66 and 67 of the Puerto Rican Income Tax Act of 1919, Law No. 80 of June 26, 1919.

Sections 38, 41, 42, 43, 44, 45, 46, 47 and 63 of the Puerto Rican Income Tax Act of 1921. Law No. 43 of July 1, 1921.

Sections 27, 39, 53, 54, 55, 56, 57, 64, 67, 68, 75, 76 and 85 of the Income Tax Act of 1924, Act No. 74 of Aug. 6, 1925.

Sections 3220 and 3226 of United States Revised Statutes as Amended by Federal Revenue Act of 1924 (See Sections 75 and 76(b) of the Puerto Rican Act of 1924).

Article 355 of Income Tax Regulations No. 1 under the Income Tax Act of 1924.

Sections 272 and 281 of the Federal Revenue Act of 1924 (See Sections 55 and 64 of the Puerto Rican Act of 1924).

Pertinent part of Sections 308 and 310 of the Political Code as Amended by Act No. 75 of August 2, 1923.

POINTS.

FIRST.

Historical and comparative considerations.

The income tax law under consideration (The Income Tax Act of 1924, herein referred to as the 1924 Act) was the first legislation in Puerto Rico under which the taxpayer was required to pay his income tax on the basis of his own calculation without any examination of his return or notice or demand on the part of any government official.

Under the Income Tax Act of 1919 (referred to as the 1919 Act) the taxpayer was required to make a return (Section 34 Individual Returns Appendix A 41) (Section 37 Corporate Returns Appendix A 41) which had to be filed before the first day of March of each year or within sixty days subsequent to the termination of the legal business year (Section 39 Appendix A 42). The taxpayer did not pay an installment of the tax on filing his return. On the contrary the Treasurer, on the basis of the return, calculated the amount of the tax which he notified to the taxpayer, and the taxpayer paid the first installment of the tax within thirty days of notification to him of the amount of the tax (Section 54 Appendix A 42). If the taxpayer did not agree with the amount determined by the Treasurer he might ask for a reconsideration (Section 58 Appendix A 43). If the Treasurer dismissed the petition for reconsideration the taxpayer then had the right to appeal to the Board of Review and Equalization within fifteen days (Section 61 Appendix A 44). The decision of the Board was final, but the taxpayer could then pay the tax imposed upon him under protest and within ten days thereafter file a complaint before a court of competent jurisdiction (Sec. 63 Appendix A 44).

However, the taxpayer had the right to bring suit to recover an *overpayment* even though he had not followed the

above procedure and had made no protest at the time of payment.

Section 66 of the 1919 Act provided:

> "That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.
>
> "That when proper claim has been made to the Treasurer or Puerto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

Construing this section, the Supreme Court of Puerto Rico in *Serralles* v. *Treasurer,* 30 P. R. R. 220 held that a taxpayer, who had paid his tax *without protest,* and even though he had not complied with the provisions of Sections 61, 62 and 63, with respect to appeal to the Board of Review and Equalization, and payment under protest, could bring suit and recover an overpayment. In other words the taxpayer had two independent courses open to him.

This result was reached by the Supreme Court of Puerto Rico although, no provision of the 1919 Act specifically dispensed with protest in the case of overpayment, and yet the same court in the present case, under the 1924 Act, which like the 1919 Act has no affirmative provision requiring protest, held that "by legislative enactment a payment under protest is a condition precedent to recovery by suit."

The 1921 Act had substantially the same procedure as the 1919 Act, as to filing the return, determination of the tax by the Treasurer and payment of the tax after receipt of such notification. The 1921 Law provided for appeal to the Board of Review and Equalization where the Treasurer had modi-

fied the return of the taxpayer, but there was no provision for suit to recover an overpayment similar to Section 66 of the 1919 Act above quoted, or section 76 (b) of the 1924 Act.

Under the present statute (the 1924 Act) a new system as to payment was installed, following almost verbatim in its general provisions the Federal Act of the same year. The taxpayer no longer was privileged to wait until the Treasurer determined the amount of his tax on the basis of his return before paying the tax. On or before the final date for filing the return the taxpayer must pay the first installment of the tax on the basis of his own calculation (Sections 27, 39, 53 Appendix A 48). This was something new, and placed on the taxpayer himself the burden of determining the amount of the tax. However, the law was very careful to safeguard the taxpayer against overpayment. By section 54 (Appendix A 50) the Treasurer is required to examine the return as soon as practicable after it is filed and determine the correct amount of the tax. Section 55 (Appendix A 50) provides that if the taxpayer has paid as an installment of the tax more than the amount determined, the excess *shall* be credited or refunded. This section is copied verbatim from Section 272 of the Federal Act of 1924 (Appendix A 58). Section 64 (a) and (b) (Appendix A 52) provides that overpayments *shall* be credited or refunded to the taxpayer *immediately*, with the qualification that no credit or refund shall be allowed or made after four years after payment unless the taxpayer has filed a claim for credit or refund within such four years. This section follows the wording of Section 281 of the Federal Act of the same year (Appendix A 59).

Section 75 (Appendix A 53) authorizes the Treasurer to remit, refund and pay back all taxes erroneously or illegally collected to substantially the same effect as the first paragraph of Section 66 of the 1919 Act above quoted, but the wording follows the wording of U. S. R. S. 3220, rather than that of section 66 of the 1919 Act above quoted.

Section 63 of the 1919 Act (Appendix A 44), which corresponds to Section 47 of the 1921 Act (Appendix A 47) and provides that the decision of the Board of Review and Equalization shall be final, but that the taxpayer may pay the tax imposed upon him within a stated period and bring suit, is incorporated in the 1924 Act as Section 76 (a) (Appendix A 54) with unimportant changes. This subsection relates solely to deficiency assessments (Petitioner's Brief 25).

The second paragraph of Section 66 of the 1919 Act is omitted, but Section 76 (b) is added, following the wording of U. S. R. S. 3226. Since Section 76 (a) fully covers the procedure as to deficiency assessments, this subdivision (76 (b)) can have no meaning whatever unless it was inserted to take care of the overpayments with the same effect as was given to the second paragraph of Section 66 of the 1919 Act by the decision in the *Serralles* case (supra).

To summarize, the 1919 Act provided for two situations, namely deficiency assessments and overpayments. In both situations there was an opportunity to appeal to the Board, and in the case of overpayments a Section 66 independently authorized suits for recovery without appeal to the Board. The 1921 Act provided for no recourse to the courts for overpayments. The 1924 Act provided for the same two situations as the 1919 Act with the difference, however, that in only one of them, namely deficiency assessments, were there specific provisions for appeal to the Board of Review and Equalization (except the provision of Section 76 (b)). Obviously the reason for this is that this is the only situation where there was a determination by the Treasurer prior to the payment of the tax. The taxpayer himself determined and paid his tax and therefore, in the case of overpayment, there was no appealable situation at time of payment.

Section 76 (a) of the 1924 Act, taken from previous Puerto Rican legislation and not from the Federal Law, fully and exclusively covers the situation as to suits to recover where there has been a deficiency assessment, and

leaves nothing more to be said on that subject. However, Section 76 (b) is taken from U. S. Revised Statutes Sec. 3226, and makes reference both to suits where there has been an erroneous or illegal assessment (which can only be in the case of deficiency assessments already covered in the preceding clause 76 (a)) and also to claims for refund or credit which could only refer to over-payment as distinguished from deficiency assessment. It then provides that no suit can be brought "until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on Appeal, according to the law in that regard".

Does Section 76 (b) mean nothing, as the Supreme Court of Puerto Rico and petitioner contend; or does it mean (1) that no suit may be brought in the case of an erroneous or illegal assessment, namely a *deficiency assessment*, until an appeal has been taken to the Board (which would be merely a repetition of the provisions of clause (a)) and also (2) that no suit may be brought to recover an *overpayment* until a claim has been filed with the Treasurer and with the Board of Review and Equalization on appeal, this being the *only* situation where a claim for credit and refund had been provided for?

Any apparent confusion in the wording is explained by the fact that U. S. R. S. 3226, which is a general law referring to all kinds of taxes and intended to cover all situations, was incorporated as Section 76 (b), without taking into consideration that one situation, namely deficiency assessments, had been fully disposed of in Section 76 (a), taken from previous local laws.

According to normal canons of construction the section must be given the most reasonable meaning possible, in view of the entire legislation, rather than dismiss it as meaningless, and since the meaning approved by the majority of the Circuit Court would seem to fairly reflect the spirit and intent of the legislation, we believe that it should be affirmed.

The language of Section 76 (b) and R. S. 3226 is almost identical except that Section 3226 R. S. applies to all internal revenue taxes, whereas Section 76 (b) applies only to this special tax, namely income and excess profits tax. Where Section 3226 reads—"until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of the law in that regard, and the regulations of the Secretary of Treasury established in pursuance thereof," Section 76 (b) substitutes "the Treasurer and with the Board of Review and Equalization on appeal" for "the Commissioner of Internal Revenue" and omits the words "of the Secretary of Treasury".

Section 3226 Revised Statutes had been amended in 1924 by adding "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress". This amendment was not carried into Section 76 (b) of the Puerto Rican Act for reasons appearing more fully hereafter.

SECOND.

The nature of the Treasurer's duty to refund overpayments.

The Supreme Court held that "this is discretional matter in the Treasurer" (R., 21). If this were correct, the conclusion of the court that there is no right to file suit against the Treasurer, would necessarily follow, as the courts will not interfere with an administrative officer in the exercise of his discretion either by suit at law or by mandamus. If it is not correct then the conclusion of the court is founded on an incorrect premise.

On the other hand, if it is a discretional matter, the court has committed an error equally serious. If it is solely within the discretion of the Treasurer whether or not there

has been an overpayment and if so whether or not it should be returned, then the Legislature has delegated its legislative power to the Treasurer and this it cannot do, as no such authority is conferred on the Legislature by the Organic Act. *United States* v. *Laughlin*, 249 U. S. 440, 443. The statute should be construed, if possible, "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score" *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401.

The pertinent sections of the law are Sections 54, 55, 64 and 75, which read:

> "Section 54: As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax."
>
> Sec. 55. "If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess *shall be* credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess *shall be* credited or refunded as provided in Section 64." (See 272 Federal Act of 1924 Appendix A 58).
>
> Sec. 64: "Where there has been an overpayment of any income or excess-profits tax imposed by this Act * * * the amount of such overpayment *shall be* credited against any income or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess *shall be* refunded *immediately* to the taxpayer." (See Section 281 of the Federal Act of 1924 Appendix A 59).
>
> Sec. 75: "The Treasurer is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected * * *" (See Section 3220 R. S. U. S. Appendix A 55). (Italics supplied.)

Even the dissenting judge of the Circuit Court of Appeals, (Judge Morton R., 34) held that if there is an overpayment it is the duty of the Treasurer to make a proper refund. It is hardly necessary to cite cases. The language is clearly mandatory. While permissive language is often construed as mandatory, it would be a rare case where mandatory language is construed as permissive.

The Treasurer can not escape his duty or a review by the Courts on the ground that he has not made a determination as provided in Section 54, or that he has made a determination adverse to the taxpayer. Section 54 directs the Treasurer to determine the *correct* amount of the tax. Section 55 directs him to credit or refund any amount determined to be in excess of the correct amount. Nowhere in the Act is his determination declared to be final or conclusive. The question is whether the power of the Treasurer to determine is conclusive or whether such determination by him is subject to review by the Courts.

In *United States* v. *Laughlin*, 249 U. S. 440, the statute provided that "where it shall appear to the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives." The Government contended that a favorable decision by the Secretary is a condition precedent to the right of recovery. The court rejected this argument in the following language:

> "We cannot accept this construction of § 2 of the Act of 1908. According to it, although facts were made to appear to the entire satisfaction of the Secretary showing that a person had made 'payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws,' it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that

it ought to be repaid, notwithstanding Congress had declared that under the precise state of facts it should be repaid. *Under this construction the legislative power would in effect be delegated to the Secretary''* (italics supplied).

Corresponding and similar sections of Federal Tax egislation have been held to be mandatory. *Greenport Basin & Construction Co.* v. *United States*, 269 Fed. 58, 59, ff'd. 260 U. S. 512; *Hyatt Roller Bearing Co.* v. *United States*, 43 Fed. (2d) 1008, 1021; *United States* v. *Hvoslef*, 37 U. S. 1, 12.

If the power of the Treasurer is limited to the extent dmitted by petitioner (Brief 38, 39), there must be some ay to compel the Treasurer to do his duty according to he law. If there is no remedy at law we agree with petiioner that a mandamus will lie, but that is not what the upreme Court held.

The decision of the Supreme Court gives the Treasurer bsolutely uncontrolled and arbitrary power—a power hich places an administrative official, not qualified by raining, and anxious to maintain the revenues of the govrnment at the highest possible level, *in a position where e, an interested party, is the final judge of both fact and law.* Ie is hardly likely to exercise this power in favor of the axpayer if he knows that there is no recourse to the courts. nder the decision of the Supreme Court there can be no scape from the conclusion reached by Judge Bingham that he payment of the taxpayer's just claim would be left olely to the whim of the Treasurer (R., 28). *United States* . *Laughlin* (*supra*).

The Legislature hardly intended this result.

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THIRD.

The obligation of the Legislature of Puerto Rico to provide a recourse to the courts.

It is conceded that the Legislature is not obligated to provide a remedy by suit.

The question, however, is whether the Legislature in this particular situation did provide a remedy either by express language or by necessary implication.

As stated by this court in *Dismuke* v. *United States*, 297 U. S. 167, 172, in the part of the quotation omitted by asterisks in petitioner's brief (p. 22):

> "But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."

FOURTH.

The Legislature authorized suit to recover over-payments of income tax.

The questions (1) whether or not the Legislature authorized suit, and (2) whether or not, having authorized suit, payments under protest is an essential condition precedent thereto, are independent questions and will be treated separately.

Section 76 (b) provides that no suit may be brought *until* a claim for refund or credit has been filed. In this respect its language is the same as Sec. 3226, United States Revised Statutes.

This court has expressly held that that section authorizes suit against the United States and the Collector of Internal Revenue. *United States* v. *Michel*, 282 U. S. 656, 658; *Graham* v. *Dupont*, 262 U. S. 234, 258.

The situation is the same whether the suit is against the Collector or against the United States. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396, citing 26 U. S. C. 156 (R., S. 3226) and the so-called Tucker Act (suits against the United States), 28 U. S. C. Sec. 41 (20); *Tucker* v. *Alexander, Collector*, 275 U. S. 228.

The argument is made that this is a "negative pregnant," in other words that since the statute only provides that no suit may be brought until a claim is filed, it cannot be implied that suit may be brought *if* a claim is filed; that unless there exists elsewhere definite provision, there is "no law in that regard."

Petitioner draws an analogy between the rules of construction of a statute and the construction of a pleading.

The Income Tax Law of 1924 is not a pleading phrased in "negative pregnants" to mislead an opposing pleader. It is a solemn act of the Legislature adopted to define the rights of the taxpayer and of the Government. When the Legislature provided that no suit shall be brought until a claim for refund or credit has been duly filed with the Treasurer, it must necessarily have referred to the only claims for refunds or credits which were provided for in the law, namely claims for credits or refunds of overpayments covered by Section 64 (c) under the title, "Credits and Refunds," and must have intended it to be understood that suit can be brought *if* such claim has been filed. "The statute (referring to R., S. 3226) and the regulations must be read in the light of their purpose. Statutes are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparation for trial." *Tucker* v. *Alexander* (*supra*).

To construe the phrase "according to the provisions of the law in that regard" as modifying "suit or proceeding" (See dissenting opinion Judge Morton, R., 357 and petitioner's brief, pp. 24-25), distorts the grammatical construction of the clause. To justify that construction, since the clause begins with a negative, the word "except" or its equivalent would have to be read into the clause before the words "according to" in order to make it grammatically correct. The phrase "according to the provisions of the law in that regard" naturally, grammatically and clearly refers to the immediately preceding language with respect to the filing of the claim and the appeal to the Board. This court has constantly construed the words in U. S. R. S. 3226 "according to the provisions of law in that record and the regulations of the Secretary of Treasury established in pursuance thereof" as referring to the claim for refund or credit filed with the Commissioner of Internal Revenue. *United States* v. *Memphis Cotton Oil Co.*, 228 U. S. 62, 66.

The construction contended for by petitioner not only is opposed to the constant construction of the same language by this court but is not a construction adopted by the Supreme Court of Puerto Rico. The Supreme Court of Puerto Rico in one of the two decisions relied on, *Compania Agricola de Cayey, Ltd.* v. *Domenech*, 47 D. P. R. 535, ignored the section altogether, and in the other, *Porto Rico Fertilizer Co.* v. *Bonet* (See Appendix B), held that it was surplusage on the theory that the case was governed by Section 76 (a). Both these cases are fully discussed below.

If, therefore, the taxpayer has complied with the conditions precedent to bringing suit established by Section 76 (b), that section authorizes suit to be brought.

FIFTH.

Payment under protest as a condition precedent to bringing suit.

The Supreme Court concedes that compliance with the condition is impossible in the nature of things:

"We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it [the taxpayer] to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one" (R., 20).

Whether or not protest is required must be determined "in the light of the manifest purpose and scope of the legislation." *United States* v. *Hvoslef*, 237 U. S. 1, 12.

"Resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrator." *Dismuke* v. *United States* (supra).

Payment under protest is not expressly required by statute.

While protest is expressly required by section 76 (a) as a condition precedent to suit where the Treasurer has assessed a deficiency against the taxpayer, who has appealed to the Board which has sustained the Treasurer, and the Taxpayer has *then* payed the tax, there is no provision in section 76 (a) or elsewhere requiring protest at the time of payment as a condition precedent to recovering an *overpayment.*

The only condition found in the income tax law other than those contained in section 76 (b) itself is that the taxpayer shall have filed his claim for credit or refund within four years after payment (Section 64 (b)) if the Treasurer of

his own accord has not made a proper refund as he is required by law to do.

Since no protest is required in order to enable the Treasurer to entertain a claim for credit or refund (see Section 64) it would be a most unusual situation if, after the claim has been denied, suit can be brought only if the original payment had been made under protest.

Section 76 (b) requires only that the taxpayer shall have filed a claim for refund or credit with the Treasurer and with the Board of Review and Equalization on appeal, within the four year period required by Section 64 (b).

No suggestion has been made that the "claim for refund or credit" means or implies a payment under protest. If this were the case we would be reading something into the section which is not there. The Supreme Court does read into Section 76 (b) the requirement of payment under protest, but it does so by taking it out of its context in Section 76 (a), *Porto Rico Fertilizer Co.* v. *Domenech* (Appendix B) and not by inference from the wording of Section 76 (b) (see below p. 36). All three judges of the Circuit Court of Appeals and the petitioner concede that Section 76 (a) has no application.

We must look elsewhere for the statutory requirement of payment under protest if there is such requirement.

It is not in the General Law (Act No. 8 of 1927), for the court held that this law is not applicable as the Income Tax Act of 1924 "is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest" (Appendix B 76).

The general principles of law applicable in Puerto Rico do not predicate recovery on payment under protest.

The common law (derecho comun) of Puerto Rico is not derived from English sources but from the Civil Law system as expressed in the Civil Code.

Under the 1919 Act which had also provided for the return of overpayments, the Supreme Court had already held that suit could be maintained although the taxpayer had not paid under protest and although the 1919 Act contained no provision excusing protest. *Serralles* v. *Treasurer* (supra). *McCormick* v. *Bonner, Treasurer,* 44 D. P. R. 432 (Spanish). This is in harmony with the *Civil Law,* which in contradistinction to the *common law* in force on the Continent, expressly provides (Civil Code of Puerto Rico, Section 1795):

> "If a thing is received when there was no right to claim it and which, through an error, has been unduly delivered, there arises an obligation to restore the same."

In discussing the application of this section the Supreme Court in *South Porto Rico Sugar Company* v. *Treasurer,* 26 P. R. R. 446, remarked:

> "Mr. Chief Justice Fuller in *Chesebrough* v. *United States,* 92 U. S. 259, said: 'The rule is firmly established that taxes voluntarily paid cannot be recovered back and payments with knowledge and without compulsion are voluntary.' In *Guerra* v. *Treasurer,* 8 P. R. R. 280 (1905) this court held that a payment of taxes without duress prevented a recovery. On page 305 of the opinion the reasons for the rule are given by citations from Cooley on Taxation. The theory was, following the common-law rule, that a mistake of law in payment would leave the person who paid without a remedy. The decision in the *Guerra* case was made on the assumption, without discussion, that the common-law rule was applicable in Puerto Rico, and without any consideration of Section 1796 [later renumbered 1795] of the Civil Code, a matter which we reviewed in *Arandes* v. *Baez,* 20 P. R. R. 371."

It is argued that because the Legislature in adopting Section 3226 R. S. omitted the addition of the words "but

such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress" it was intended that no suit should be brought unless there had been payment under protest or duress.

But the Legislature *did* intend to require payment under protest as a condition precedent in the case of a deficiency assessment and expressly so provided (Sec. 76 (a)). Obviously by the time the taxpayer had fought his case through the Board of Review and Equalization, he knew when he paid the tax whether or not he intended to contest by suit. If the Legislature had intended to require protest at the time of payment as a condition precedent to bringing suit to recover an *overpayment*, it is more logical to assume that it would have expressly so provided, rather than rely on an inference from an omission in copying the Federal statute which very few taxpayers had ever even heard of.

Furthermore, as the law stood in Puerto Rico at the time the legislation was enacted, protest was not a condition precedent (Civil Code Sec. 1795 (supra)), *South Porto Rico Sugar Company* v. *Treasurer* (supra), and the Supreme Court had so held under the 1919 Act. *Serralles* v. *Treasurer* (supra).

Why expressly negative a condition which did not exist?

Section 3226 of the Revised Statutes, was a general statute, not confined to income taxes but covered the whole field of internal revenue and customs. It was in the latter classes of cases that the rule of payment under duress and protest had been rigidly enforced.

This court held even prior to the amendment to R. S. 3226 in 1924 dispensing with protest, that protest was not required as a condition precedent to suit to recover overpayents of taxes when the law imposes the mandatory duty to refund.

United States v. *Hvoslef*, supra (1915);
United States v. *Jones*, 236 U. S. 106 (1914).

And it has been so held under Federal income tax legislation similar to the Puerto Rican Act of 1924.

Greenport Basin & Construction Co. v. *United States* (supra);
Hyatt Roller Bearing Co. v. *United States* (supra).

The cases cited by this petitioner (brief 23) involve principles of the common law which never were applicable in Puerto Rico.

United States v. *Cuba Mail S. S. Co.*, 200 U. S. 488, was a case involving the refund of money paid for revenue stamps which the court decided on the authority of *Chesbrough* v. *United States*, 192 U. S. 253, a similar case also cited by petitioner and which was distinguished in *South Porto Rico Sugar Company* v. *Bonner* (supra); *Little* v. *Bowers*, 134 U. S. 547 involved New Jersey real estate tax and was decided on the ground that the tax had been paid under a compromise and there was therefore no controversy. *Elliott* v. *Swarthout*, 10 Pet. 137, and *Curtis Admx.* v. *Fiedler*, 2 Black 461 were both customs cases brought personally against the collector on assumpsit and strictly applied the common law principles applicable to assumpsit; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 374, although an income tax case held that the amendment to R. S. 3226 in 1924 excusing protest applied to cases arising under previous income tax acts and does not conflict with the opinions we have cited above. The opinion points out that the amendment was adopted to correct an injustice—an injustice which will be introduced in Puerto Rico for the first time if the decision of the Supreme Court in this case is allowed to stand.

SIXTH.

The Treasury regulations.

Following the adoption, on August 6, 1925, of the Income Tax Law of 1924, the Treasurer on May 17, 1926, approved Regulations as provided by the Act. The pertinent article (355) which, in the printed regulations, immediately follows a copy of Section 76 of the Act, is printed in Appendix A (57).

There were no interpretations of the Section 76 (b) of the Act by the Supreme Court until much later, so that the Treasurer had for his guidance only the Act itself, the decision in *Serralles* v. *Treasurer* (supra) under the 1919 Act, and decisions of this court under R. S. 3226.

The Regulation 355 provides that *when the taxpayer receives notice from the Treasurer that the income tax has been determined* he may make a voluntary payment, without appealing to the Board, file a claim for credit or refund with the Treasurer within four years of payment, and if the claim is denied bring an ordinary action. This obviously is inaccurate language, and it is argued that the Regulation therefore can have no application.

While the 1919 Act provided for payment only *after* a determination by the Treasurer, and the 1924 Act provided for payment on a fixed date without the necessity of a determination, nevertheless the 1924 Act does provide specifically for an examination of the return upon filing, a *determination* of the amount of the tax, a notification of underpayment and a refund of overpayments (Secs. 54 and 55 Appendix A) and it became the practice and still is on the part of many taxpayers (although there is under no authorization therefor under the law) to file a return without payment well in advance of the payment date, obtain an examination before the payment date, and pay on the basis of the Treasurer's determination. The practical effect was and is to obtain

the advantage of a ruling by the Treasurer before payment, substantially the same as under the 1919 Act.

The essential point in the Regulation, however, is that it provides that upon filing a claim for credit or refund and denial thereof by the Treasurer, the taxpayer may bring an ordinary action.

We submit that this was a fair interpretation of Section 76 (b), taken in conjunction with Section 64 (c), in view of the *Serralles* case, if the Treasurer was warranted in regarding Section 76 (b) as a substitution for the second paragraph of Section 66 of the 1919 Act, as we think he was.

Regulations which had stood and been relied on for many years without being questioned should at least have received serious consideration, and, unless obviously in violation of the express provisions of the statute, should have been sustained. *United States* v. *Morehead*, 243 U. S. 607; *Tyson* v. *Commissioner*, 68 F. (2d) 584 (cert. denied 292 U. S. 657). Instead of doing so the Supreme Court has ignored not only the regulations but the provisions of the law Sec. 76 (b) upon which they were based.

The contention of petitioner that the regulations refer only to deficiency assessments, and that they are a hangover "from the 1921 Legislation," is answered by the fact that they cover claims for credit and refund which can only refer to the only claims for credit and refund covered by the 1924 law, namely claims for credit or refund of overpayments, and by the fact that nowhere under the 1921 Act is there any mention of or provision for claims for credit or refund.

Whether or not the Treasurer applied these regulations, they were never revoked and taxpayers at least were justified in assuming that they were in force and in giving them the interpretation which they reasonably appear to bear. Otherwise their only effect would be to mislead the taxpayer.

SEVENTH.

The power of the Board of Equalization to determine the facts.

The Board of Review and Equalization is a creature of the Political Code, and not of any special law. It is the administrative board set up to hear, review and adjust decisions of the Treasurer on tax matters in general. Its functions are not confined to income taxes. Its powers as to income tax are defined as follows:

> "To fix the income tax of any taxpayer; and upon recording such determination, the Board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said Board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income tax, and to correct all errors as such errors are brought to its attention." Section 310 of Political Code as amended by Act No. 75 of August 2, 1923.

There is no general repealing clause in the Income Tax Law of 1924, although the Law of 1921 is expressly repealed. Provisions of the fundamental laws of Puerto Rico, embodied in the codes, are not repealed by implication.

On the contrary, section 67 of the Income Tax Law of 1924 expressly provides:

> "Section 67.—All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act."

The sections of the Political Code above quoted fall under the title "Assessment of Property."

The Income Tax Law of 1924 provides no procedure before the Board of Review, nor for the scope of review, nor for the manner in which the Board is to be constituted, although it does provide for appeals to the Board. If the procedure before the Board and the scope of its review are not defined by the sections of the Political Code above referred to, then there is no legislation on this subject.

The income tax law determines that an appeal to the Board of Review and Equalization is required in certain cases. The income tax law stops there. The procedure and scope of the review on appeal, whenever required, is defined by the Political Code and is the same whether the matter comes before the Board on a deficiency assessment or on a claim for credit and refund. The task of the Board in determining the tax is no different in one case than in the other.

If petitioner's contention were correct, every time a tax law is enacted covering a new situation and providing for an appeal to the Board, the Political Code would have to be amended to give the Board jurisdiction.

Assuming, therefore, that the appeal to the Board in this case was authorized by the Income Tax Law, the Board was entirely within its proper functions in fully reexamining the return and readjusting the tax. The Board did this not only once but twice. After the first determination the Treasurer had full opportunity to re-study the matter which he presumably did, and to present his case to the Board on the second appeal. However, when the Board re-affirmed its decision on the second appeal the Treasurer should have complied with the ruling. When he did not do so and the taxpayer brought suit the ruling in his favor by the Board at least established a prima facie case in his favor without more, and shifted the burden to the Treasurer, whose remedy as to the merits was by answer setting up the grounds wherein he deemed the Board to be in error rather than by demurrer.

Moreover, as we have stated above (p. 2), the question as to the sufficiency of the statement of facts was not passed upon in any court below and should not be heard for the first time in this court.

EIGHTH.

The function of the court in suits against the Treasurer for the recovery of taxes.

The courts in Puerto Rico have jurisdiction to investigate the facts on the merits and are not bound by any finding of the facts by the Treasurer or the Board of Review and Equalization. It is a trial de novo. The principle is the same whether the matter arose originally out of a deficiency assessment or an overpayment, as in both cases the matter has already been passed upon by an administrative official or body.

Although Section 54 of the Act directs the Treasurer to make a determination of the tax, neither in this section nor elsewhere in the Act, is his determination declared to be final or conclusive. Even if it did so provide, his determination would be subject to judicial review. *United States* v. *Laughlin* (supra). But, since the law did not provide that the determination is final or conclusive, the court has jurisdiction to re-examine and redetermine the facts.

The matter is fully discussed by the Supreme Court in *Porrata* v. *Domenech*, 51 D. P. R. 215. As the case is not reported in English, we will summarize it at length.

The plaintiff had sold a farm which she had owned since prior to March 1913. The Treasurer notified taxpayer of a deficiency for the year in which the farm was sold. Taxpayer had paid the deficiency as reduced by the Board and brought suit to recover. The lower court found as a fact that the property was worth $25,000 more in 1913 than the Board had determined, and directed that a new liquidation be made of the tax and that the amount erroneously col-

lected be returned to the taxpayer. The Supreme Court said:

> "The defendant contends that since what is involved is a conclusion of fact reached by the Board from an examination of evidence and in the exercise of its powers, such conclusion cannot be altered by the district court.
>
> "We believe that the Legislature in establishing the remedy authorized by section 76 of Act #74 of 1925 (Income Tax Act of 1924) conferred upon the courts the jurisdiction necessary for an investigation and decision upon all questions included therein properly submitted to them. One of these questions is undoubtedly the valuation of the property when that valuation serves as in this case, as the basis for imposing a tax.
>
> "The property in question was assessed for the year 1913 for the purpose of property taxes at $19,000, and that was the valuation which the Treasurer took as a basis for the imposition of a tax. On the appeal to the Board, that body in accordance with the statute which provides that the basis for the calculation must be the cost or the fair market value of the property on March 1, 1913 (see sections 5 and 6 of Act. No. 74 of 1925), fixed the value of the property at $40,000, that is, at $300 per acre.
>
> "What procedure did the Board follow? We do not know. On what evidence did it base its conclusion? The defendant has repeatedly insisted that the evidence offered in court was the same as that submitted to the Board, but we have found nothing in the record to support this. We believe that in a case of this kind the defendant must offer the evidence necessary to permit the district court to enter a proper judgment."

The rule is the same under the Federal Statute. Referring to the procedure under R. S. 3226 this Court said in a case involving the limitation of the time within which suit can be brought:

> "It is certain that by the amendments to Section 252 and Section 3226 Rev. Stats. by the Act of March

> 4, 1923, C. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against its assessment which he attempted to raise in the bill." *Graham* v. *Du Pont*, 262 U. S. 234, 258.

The only distinction between the above cases and the present case in so far as pleadings are concerned is that here the taxpayer is not seeking to controvert, but to *sustain* the ruling of the Board which in the absence of any allegations to the contrary should be presumed to be correct. This places the burden of attack on the Treasurer.

NINTH.

The decision of the Supeme Court of Puerto Rico was clearly erroneous.

The decision in this case is based on the following previous decisions:

(1) The decision of the court in *Porto Rico Fertilizer Co.* v. *Domenech*, expressed in three opinions, two of which were on reconsideration, and which for the convenience of the court are attached hereto as Appendix B. That case was heard and decided jointly with the present case in the Circuit Court of Appeals. The only difference between the two cases is that in the *Porto Rico Fertilizer* case there had been no appeal to the Board of Review and Equalization, which the Circuit Court considered sufficient basis for affirmance.

(2) The decision of the Supreme Court in *Compania Agricola de Cayey, Ltd.* v. *Domenech*, 47 D. P. R. (Spanish) 535 decided in 1934.

While the petitioner calls attention to two respects in which the decisions conflict, he insists that there is no conflict on the points herein involved (Brief 36 footnote).

The only basis for petitioner's conclusion that there is no conflict is that the court approved its previous decision in *Compañia Agricola de Cayey, Ltd.* v. *Domenech* (supra).

Consistency with its previous decision is not an essential criterion for determining whether or not the court was clearly erroneous. The court might, and we maintain did, persist in a patent misconception of the statute.

The court, however, not only misconstrued the statute, but its decisions in these cases are in conflict with its two previous decisions in *Serralles* v. *Treasurer*, 30 P. R. R. 220, and *McCormick* v. *Bonner, Treasurer*, 44 P. R. R. 432 (Spanish) decided in 1933. The only explanation the court gives is that the previous statute had been repealed (Appendix B 73). This is not sufficient reason for failing to follow applicable principles of jurisprudence already established.

In the *Serralles* case, as we have already pointed out (p. 8) decided under the 1919 Act, the court held that under Section 66 of the Act a suit could be brought to recover a voluntary overpayment, made without protest. No affirmative provision of the 1919 Act excused protest. In fact the Act provided a procedure for appeal to the Board and payment under protest in every case.

The only possibly statutory basis for suit without appeal and protest under the 1919 Act was the second paragraph of Section 66 which neither requires or excuses protest. (See supra p. 20 and Appendix A). Dispensing with protest in the *Serralles* case could only have been warranted on the ground that the Civil Law in Puerto Rico which corresponds to the common law on the Continent does not require protest. That such is the law had been pointed out by the court in *South Porto Rico Sugar Company* v. *Treasurer* (see supra p. 21).

The court reiterated its holding in the *Serralles* case in *McCormick* v. *Bonner, Treasurer* (supra), (Spanish) in the following language (our translation except for the quotation from the *Serralles* case which is the original English):

> "The People of Puerto Rico called our attention to the fact that the taxes were paid voluntarily and

without any protest, that appellants permitted a year to pass without requesting their return and that the complaints were not filed until 1923."

(Here the court copies Sections 63 and 66 of the Act of 1919, see Appendix A 44).

"In this respect we said in *Serralles* v. *Treasurer*, 30 D. P. R. 237, 240 (30 P. R. R. 229, 223):

'The appellee insists that the complaint does not adduce facts sufficient to constitute a cause of action. He alleges that in addition to Section 66 of Act. No. 80 of 1919, sections 61, 62 and 63 thereof are also applicable, and that inasmuch as it is not alleged in the complaint that an appeal was taken to the Board of Review and Equalization, or that the tax was paid under protest, the plaintiff has no right of action.

'We do not entertain this view. It is true that Section 66 prescribes that the action shall follow the procedure authorized and the proceedings established by Section 63, but this clearly refers to the time within which to bring the action, to the title of the complaint and to the manner of prosecuting the action in court, all of which is to be found in Section 63, and it is not necessary to supplement the intent of the legislators by the provisions of sections 61 and 62. Clearly the cases are different. The law is liberal and affords ample opportunities for correcting any error or repairing any injustice; first, when the taxpayer takes the first step and, second, when after the tax is levied and collected without difficulty or protest the taxpayer requests the refund of what in his opinion was unlawfully collected from him.'

"This case clearly serves as authority for the fact that it is not necessary to appeal to the Board of Review and Equalization nor pay under protest."

It is significant that Section 63 of the 1919 Act referred to, is almost identical with Section 76 (a) of the 1924 Act except for provisions with respect to reconsideration with which we are not concerned, and that in both Section 63 of the 1919 Act and Section 76 (a) of the 1924 Act payment

under protest is required after the decision of the Board. Yet the court held in the *Serralles* case and in the *McCormick* case that the Section did not require protest in the case of return of voluntary overpayments and in this case and the *Porto Rico Fertilizer* case held that it does require protest.

Furthermore, the liberal policy expressly recognized under the 1919 Act is substituted by a narrow policy, although the 1924 Act returned to the liberal policy of the 1919 Act in even more emphatic terms after discarding the narrow policy of the 1921 Act.

There appear to be no cases under the 1921 Act except *Compania Agricola de Cayey* v. *Domenech* (supra), decided in 1934, which involves taxes paid under the 1921 Act and procedure of the 1924 Act. The sum of $352.57 was involved and the case, therefore, was not appealable to the Circuit Court. It is not reported in English. The taxes involved had been paid for the years 1921, 1922 and 1923, *when the 1921 Law and not the 1924 Law was in force.* The suit was to recover an overpayment. The opinion quotes Section 64 of the 1924 Act (Appendix A 52); and states that it did not appear that the taxes had been paid under protest or that the decision of the Treasurer had been appealed to the Board. The court said (our translation):

> "Now, then, the 1919 Law (No. 80, p. 613) gave the taxpayer directly the right to bring suit upon the failure of the Treasurer to return the taxes, whether they had been paid under protest or not. The subsequent 1921 Law eliminated the substantive right to apply to the Treasurer independently, *but the question arises whether that part of the law which subjects the Treasurer to suit was likewise repealed.* In other words, the Legislature in 1919 said that the Treasurer might be sued to collect taxes which had been paid previously by the taxpayer. The final provision of the 1921 Law repealed all laws inconsistent therewith, *but the question to be decided is whether that part of the law which granted the remedy was also repealed.* We have come to the conclusion that it was.

> "It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. *The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by suit also disappeared.* From 1919 on the payment under protest was an express condition preliminary to the initiation of a lawsuit. Though the law of 1919, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the return of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 (1924) granted the substantive right of filing appeal with the Treasurer, even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919." (Italics supplied).

Obviously, the attention of the court was concentrated solely on a situation arising under the 1921 Law, under which the taxes had been paid and not on taxes payable under the 1924 Act, or the procedure which should apply thereto. This opinion should have been interpreted in the light of the matter before the court. Regulation 355 (supra p. 24), under the 1924 Act, was not referred to or discussed, nor did the relationship between the second paragraph of Section 66 of the 1919 Act and Section 76 (b) appear to have been considered.

With this background we come to the opinions in this case and the three opinions of the Supreme Court in the *Porto Rico Fertilizer* case.

The opinions in the present case rest squarely on the opinions in the *Fertilizer* case and on *Compañia Agricola de Cayey, Ltd.* v. *Domenech* (supra). Reference is also made

to the decision of this court in *Little* v. *Bowers*, 134 U. S. 54, to the effect that voluntary payments in the absence of statute cannot ordinarily be recovered.

It is first stated that this is a discretional matter (R. 21). As we have pointed out above, Page 12, this is clearly erroneous as the statute is worded in mandatory terms, and in this all three judges of the Circuit Court of Appeals and the petitioner agree. Furthermore, the basis for concluding that the matter is discretional is the wording of Section 75 of the Act (Appendix A 53) in which it is provided that the Treasurer is *authorized* to remit, etc. The court entirely overlooks the mandatory provisions of Sections 55 and 64 (Appendix A 50, 52), and ignored the fact that under the 1919 Act the same language was clearly mandatory, the only difference being that the authorization for suit in that case appears in the second paragraph of Section 66, whereas under the present Act it appears in Section 76 (b). Having made this error, the conclusion is readily understandable. Obviously, there is no recourse to the courts to control the discretion of an administrative officer.

With respect to the necessity of protest, the opinion is based on the decision in *Compañia Agricola de Cayey, Ltd.* v. *Domenech* (supra), which we have discussed above, and it is said that protest is made a condition precedent by *legislative enactment* (R. 21). The only possible legislative enactments on the subject, as we have seen (supra p. 19), are Section 76 (a), which all three judges of the Circuit Court and the petitioner (Brief 25) concede has no application whatever to overpayments, and Act No. 8 of 1927, which is general tax legislation, and which the court itself held, reversing a former decision, has no application to income tax matters covered by the 1924 Act.

The only explanation of the holding that protest is required by legislative enactment is that the court, following the *Porto Rico Fertilizer* case, erroneously considered the matter to be controlled by Section 76 (a).

A study of the three opinions in the *Fertilizer* case (Appendix B 62 to 78) conclusively demonstrates this. The District Court had sustained the demurrer on the ground that payment had not been made under protest as required by Section 76 (a). The first opinion in the *Fertilizer* case (Appendix B 62), after summarizing Sections 76 (a) and 76 (b), concludes that the meaning of these subdivisions is that the tax shall be paid under protest before refund can be obtained and that suit against the Treasurer shall be filed within a year, but that "said proceeding shall not be maintained in any court unless, *after payment under protest*, a claim for refund shall have been duly filed with the Treasurer and with the Board of Equalization on appeal." (Appendix B 64).

What the court did was to take the words "after payment under protest" out of Section 76 (a) and insert them in Section 76 (b), obviously under the impression that both sub-sections covered the same subject matter (Appendix B 64).

In the second opinion (Appendix B 65 to 77), the court states, "The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax", and then proceeds to discuss *deficiency* assessments.

This indicates a fundamental misconception on the part of the court. The language above quoted sets forth the procedure under the 1919 and 1921 Acts. What the court fails to say, and could not have had in mind, was that the taxpayer must *pay his tax* on or before the final date for filing of the return, and that the examination of the Treasurer comes *after* rather than *before* payment.

The court then refers to Section 76 (a), quotes Section 76 (b), and asks and answers the following question:

> "Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is af-

firmed by the Board a claim for refund has to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

"Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th, last.

"Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the Legislator. Why such duplicity? (sic) If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?"

Obviously the court only had in mind and was concerned with the question as to whether, after the Board, as provided in 76 (a), has denied an appeal, the taxpayer must again file a claim for refund with the Treasurer before bringing suit, and the court of course concludes that this would be an unnecessary formality. This demonstrates that the court had in mind that Section 76 (b) referred only to the situation covered by 76 (a) and apparently did not consider or investigate the proposition that Section 76(b) covers claims for refund or credits of overpayments and is the section which authorizes suit in the matter of claims for credit and refund of overpayments, and in effect is a substitution in the 1924 Act for the second paragraph of Section 66 of the 1919 Act.

The conclusion of the court is that "when the taxpayer, feeling aggrieved by the income tax *levied* by the Treasurer, files his claim with said official, and his claim is denied and he appeals to the Board, which also decides the case against him, and *he then pays under protest*, he may, within the term of thirty days fixed by law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any

other preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization." (Appendix B 71). (Italics supplied.)

The court throughout is discussing a situation with which this case is not in the slightest concerned and entirely confuses the procedure where there is a deficiency with the procedure where there is an overpayment.

The court then proceeds to discuss *Compañia Agricola de Cayey, Ltd.* v. *Domenech* (supra), quoting from the latter part of the opinion above quoted, and fails to note that the matter under discussion was taxes paid under the 1921 Act, which contained no provision similar to the second paragraph of Section 66 of the 1919 Act or Section 76 (b) of the 1924 Act, and on which point the court in that case obviously had its attention concentrated.

The *Serralles* and *McCormick* cases are summarily dismissed in three lines, on the ground that they are not applicable because they are based on the Repealed Law of 1919 (Appendix B 73). It apparently did not occur to the court that the principles of those cases might be applicable under the 1924 Act, which reinstated the right to recover overpayments which had existed under the 1919 Law.

The Court continues with an entirely separate problem and reverses its previous holdings in *American Colonial Bank* v. *Domenech*, 43 D. P. R. 889, and *Soto Gras* v. *Domenech*, 45 D. P. R. 940, to the effect that under a general law (Law No. 8 of 1927) suit might be brought within one year after payment, and held that suit must in every case be brought within thirty days as provided in Section 76 (a). This change of ruling was due to the conclusion finally arrived at that the income tax law was a complete law in itself and was not controlled by a subsequently enacted general law. It further demonstrates that the court had in mind that this situation is covered by Section 76 (a).

It is interesting to note on this point, although it is not involved in this case, that the theory of *American Colonial*

ank v. *Treasurer* (supra), holding that Law No. 8 of 1927 overned the time within which to bring suit, rather than he Income Tax Law of 1924, was recognized by the Circuit ourt of Appeals although with considerable hesitance in *omenech* v. *Verges*, 69 Fed. (2d) 714, and that the Supreme ourt in this case proceeded to reverse itself in spite of the pproval of its former ruling by the Circuit Court of Appeals.

The opinion on the second reconsideration merely involves the question as to whether the Supreme Court should e allowed to reverse itself on the question as to the time ithin which to bring suit, in the face of the recognition of ts previous decision by the Circuit Court of Appeals (Appendix B 77).

The court (R., 21) in its opinion in this case cites *ittle* v. *Bowers*, 134 U. S. 54 (a case involving New Jersey eal Estate tax) for the proposition that taxes voluntarily aid in the absence of a statute authorizing it cannot *rdinarily* be recovered. Although this is an accurate statement of the common law, the court overlooked the fact that he common law is not in force in Puerto Rico and failed to realize that while this is the rule "ordinarily" at common aw, the rule does not apply even at common law if the anifest purpose and scope of the legislation indicate that o protest is necessary. *United States* v. *Hvoslef* (supra) and that even in jurisdictions where the common law rule governs "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as the authority to decide is given to the administrative officer". *Dismuke* v. *United States* (supra). The court also failed to note that what was really held in the *Bowers* case was that there had been a payment upon compromise and therefore there was no controversy.

The opinion of the Supreme Court of Puerto Rico was clearly erroneous in holding that this was a discretional

matter; that it is governed by Section 76 (a) of the Act and therefore requires payment under protest; in failing to give effect to Section 76 (b), which under the rulings of this court and its own ruling under the 1919 Law involving a similar section, authorizes suit and establishes as the only condition precedent thereto that a claim for credit or refund shall have been filed with the Treasurer of Puerto Rico.

TENTH.

The judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

Washington, February 25, 1939.

Respectfully submitted,

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APPENDIX A

Statutes.

Sections of the Puerto Rican Income Tax Act of 1919. Law No. 80 of June 26, 1919.

INCOME RETURNS.

INDIVIDUAL RETURNS.

Section 34.—That every person having a gross income for the taxable year of one thousand (1,000) dollars, or over, if single, or if married and not living with husband or wife, or of two thousand (2,000) dollars or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this Act. If a husband and wife living together have separate incomes of two thousand (2,000) dollars or over, each shall make such a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or attorney-in-fact or by the guardian or other person charged with the care of the person or property of such taxpayer.

CORPORATION RETURNS.

Section 37.—That every partnership, association or corporation whether or not exempt from the payment of the income tax shall make a return, stating specifically the items of gross income derived within the taxable year and the deductions allowed by this Act.

The said return shall be subscribed and sworn to by one of the managing representative partners or attorneys in the case of partnerships, and in the case of associations or corporations by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer. If any American or foreign corporation, association or partnership has no office in this Island, the return shall be made by its agent or legal representative. In cases where trustees, trustees in bankruptcy or receivers or other persons who are legally in charge of the administration of the property or business of a corporation, such persons shall make returns for such corporations.

TIME FOR FILING RETURNS.

Section 39.—That returns referred to in the preceding sections shall be made to the Treasurer of Porto Rico before the first day of March of each year, or within the sixty days subsequent to the termination of the legal business year: *Provided*, That returns made for the calendar year 1918 may be used by the Treasurer for the liquidation and collection of the tax hereby levied, but the Treasurer may require new returns whenever advisable and necessary for the purposes of said liquidation; *Provided, further*, That returns to be rendered of income accruing during the calendar year 1918 shall be in the hands of the Treasurer before August 1, 1919.

LEVY AND COLLECTION OF TAX.

Section 54.—That the taxes imposed by this Act shall be computed and collected by the Treasurer of Porto Rico, and save as provided by Section 17 of this Act such taxes shall be paid in two installments each one equal to one-half of the amount of the tax. The first installment shall be paid to the Treasurer of Porto Rico within the thirty days following the day on which the payer is notified of the amount of the tax, and the second and last installment shall be paid to the Treasurer of Porto Rico in no case later than

six months after receipt of the original notice by the taxpayer, except in case of the reconsideration provided for in Section 58.

PROCEDURE FOR LEVYING THE TAX.

Section 57.—That the Treasurer, pursuant to the return made by taxpayers and pursuant to such additional reports as he may require, balances and inventories and investigations by him made, shall determine the net income of each taxpayer and shall compute the amount of the tax that shall be paid by said taxpayer, and it shall be his duty to notify the taxpayer or his legal representative as to both such items.

Section 58.—Where a taxpayer is not agreed to the decision of the Treasurer he may, within the fifteen days following notice of such decision, whether such notice is served by agent or by mail, apply in writing for the reconsideration of the case, producing all such evidence as he may deem pertinent and such as may be required by the Treasurer.

Section 59.—That if the proper investigation is made the Treasurer believes that there is just cause for granting a reconsideration, he shall do so and shall determine the amount of the net income in accordance with the new evidence produced, giving notice thereof to the taxpayer. Where the Treasurer believes that the petition for reconsideration is not well founded, he shall dismiss the same with notice to the interested parties.

Section 60.—That where a taxpayer does not ask for a reconsideration within the term fixed, or where the Treasurer, after admitting the petition for a reconsideration, shall have again determined the net income and computed the amount of the tax, as petitioned by the taxpayer, the decision of the Treasurer shall be final and no appeal shall lie therefrom, and the tax so levied shall be paid within the time prescribed in Section 54 hereof.

Section 61.—That where the Treasurer dismisses a petition for reconsideration, or where he modifies his first decision though not in terms prayed for by the taxpayer, such taxpayer may, within fifteen days following the notification of such decision, appeal to the Board of Review and Equalization created by law, alleging in writing and under oath the facts upon which he bases his claim and the reasons of law in support thereof.

Section 62.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 63.—That the decisions of the Board of Review and Equalization shall be final. In such cases the taxpayer shall pay the tax imposed upon him, within the time fixed in Section 55, under protest, and he may interpose within ten days following such payment under protest, a sworn complaint against the Treasurer of Porto Rico and before a court of competent jurisdiction. Said cases shall be given preference and priority on the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall be sufficient grounds for a judgment of dismissal.

Refund or Abatement of Taxes.

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected.

as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegaliy levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

Section 67.—That should any taxpayer pay taxes in excess of the amount properly due, the amount of the excess shall be credited against any income tax due from the taxpayer, and the remaining balance, if any, shall be reimbursed him.

Sections of the Puerto Rican Income Tax Act of 1921. Law No. 43 of July 1, 1921.

Assessment and Collection of Tax.

Section 38.—That the taxes imposed by this Act shall be assessed and collected by the Treasurer of Porto Rico, and shall be paid in four quarterly installments each one equal to one-fourth of the amount of the total tax. The first installment shall become due and be paid within fifteen days following the day on which the taxpayer is notified of the amount of the tax, and all others within the first fifteen days of the corresponding quarter.

Procedure for Levying the Tax.

Section 41.—As soon as the Treasurer of Porto Rico receives an income return he shall levy and collect such tax as the taxpayer may owe in accordance with his own return.

Verification of Returns.

Section 42.—As soon as possible the Treasurer of Porto Rico shall verify the income returns by making a study of the returns rendered by the taxpayers, and of such additional returns as he may require, and of balances or inventories, and by means of such investigations as he may make and he shall determine the net income of each taxpayer and shall compute the tax due by each, and shall serve notice of both things on the taxpayer or his legal representative.

Section 43.—If the amount due by a taxpayer as shown by the aforesaid investigation is greater than the amount paid under Section 41, the difference shall be paid to the Treasurer of Porto Rico within a period of fifteen days after proper notice shall have been mailed.

Section 44.—If the return has been made in good faith and the understatement of the tax is not due to any fault of the taxpayer there shall be no penalty or additional tax added, but interest shall be charged on the amount of the deficiency at the rate of one-half (½) per cent per month.

If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five (5) per cent of such deficiency and in addition thereto interest at the rate of one-half (½) per cent per month.

If the return is made false or fraudulent with intent to evade the tax, the tax on the additional income discovered to be taxable shall be double and an additional one (1) per cent per month shall be added.

The interest provided for in this section shall in all cases be computed upon the levying of the tax.

If the amount of tax due as computed shall be less than the amount paid, the difference shall be refunded to the taxpayer by the Treasurer of Porto Rico in accordance with the procedure provided by law.

Appeals to Board of Review.

Section 45.—When a return made by a taxpayer is modified by the Treasurer of Porto Rico, and such taxpayer does not concur in said officers' decision, such taxpayer may appeal to the Board of Equalization and Review created by law, within the fifteen days following service of notice of said decision, whether the same is served by an agent or by mail, alleging in writing, under oath, the facts on which the claim is based and the legal principles adduced in its support.

Section 46.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 47.—That the decisions of the Board of Review and Equalization shall be final. The taxpayer shall pay the tax imposed upon him, within the time fixed, under protest, and he may interpose within twenty days following such payment under protest, a proper complaint against the Treasurer of Porto Rico and before the proper district court. Said cases shall be given preference and priority in the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall constitute sufficient ground for a judgment of dismissal.

FINAL PROVISIONS.

Section 63.—That all laws or parts of laws in conflict herewith are hereby repealed; but the provisions thereof shall continue in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes.

Provisions of the Income Tax Act of 1924. Act of No. 74 of Aug. 6, 1925.

TIME AND PLACE FOR FILING INDIVIDUAL AND FIDUCIARY RETURNS.

Section 27.—(a) Return (except in the case of nonresident individuals not citizens of Puerto Rico) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March .....

TIME AND PLACE FOR FILING CORPORATE OR PARTNERSHIP RETURNS.

Section 39.—(a) Returns of corporations or partnerships shall be made at the same time as is provided in subdivision (a) of section 27, except that in the case of foreign corporations not having any office or place of business in Puerto Rico returns shall be made at the same time as provided in section 27 in the case of a nonresident individual not a citizen of Puerto Rico.

PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES DATE ON WHICH TAX SHALL BE PAID.

Section 53.—(a) Except as provided in subdivisions (b) and (c) and (d) of this section the total amount of tax imposed by this title shall be paid—

(1) In the case of a taxpayer, other than a nonresident individual not a citizen of Puerto Rico, and other than a foreign corporation not having an office or place of business in Puerto Rico, on or before the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the third month following the close of the fiscal year; and

(2) In the case of a nonresident individual not a citizen of Puerto Rico, and of a foreign corporation not having an office or place of business in Puerto Rico, on or before the fifteenth day of June following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the sixth month following the close of the fiscal year.

(b) (1) The taxpayer may elect to pay the tax in two equal installments, in which case the first installment shall be paid on or before the latest date prescribed in subdivision (a) for the payment of the tax by the taxpayer, and the second installment shall be paid on or before the fifteenth day of the sixth month after such date.

(2) If any installment is not paid on the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the Treasurer.

(c) (1) At the request of the taxpayer, the Treasurer may extend the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, for a period not to exceed six months from the date prescribed in subdivision (a) or (b) for the payment of the tax or an installment thereof. In such case the amount in respect of which the extension is granted shall be be paid on or before the date of the expiration of the period of the extension.

(2) If the time for payment is thus extended there shall be collected, as a part of such amount, interest thereon at the rate of 6 per centum per annum from the date when such

payment should have been made if no extension had been granted, until the expiration of the period of the extension.

(3) In case of payment of the amount determined as a tax by the taxpayer or of any part thereof, for the calendar year 1924, or for a fiscal year ending in 1924 or 1925, the Treasurer may grant a reasonable extension of time in which to make such payment, whether or not the taxpayer makes application to that end.

(d) The provisions of this section shall not apply to the payment of a tax required to be withheld at the source under section 22 or 35.

EXAMINATION OF RETURN AND DETERMINATION OF TAX.

Section 54.—As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax.

OVERPAYMENTS.

Section 55.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment the excess *shall be credited* against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of tax, the excess *shall be credited or refunded* as provided in section 64.

DEFICIENCY IN TAX.

Section 56.—As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (*or collected without assessment*) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined *shall be assessed* and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board *shall be assessed*, but a proceeding in a district court of competent jurisdiction may be begun, *without assessment*, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the *deficiency* of which the taxpayer has been notified shall be *assessed*, and shall be paid upon notice and demand from the Treasurer. . .

CREDITS AND REFUNDS.

Section 64.—(a) Where there has been an overpayment of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall be credited to any income or excess-profits tax then owned by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision or any amendment thereof, and any balance of such excess shall be immediately reimbursed to the taxpayer.

(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim, or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Treasurer, and such decrease is due to the fact that the taxpayers failed to take adequate deductions in previous years, with the result that there has been an overpayment of income or excess-profit taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, *without the filing of a claim therefor*, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpaymnet of tax under ction 22 or 35 any refund or credit made under the pro- isions of this section shall be made to the withholding gent unless the amount of such tax was actually withheld y the withholding agent.

(e) This section shall not (1) bar from allowance a laim for credit or refund filed prior to the enactment of his Act which but for such enactment would have been al- wable, or (2) bar from allowance a claim in respect of a x for the taxable year 1919 or 1920 if such claim is filed efore the expiration of five years after the date the return as due.

General Administrative Provisions Law Made Applicable.

Section 67.—All administrative, special or stamp pro- isions of law, including the law relating to the assessment f taxes, so far as applicable, are hereby extended to and ade a part of this Act.

Rules and Regulations.

Section 68.—The Treasurer is authorized to prescribe ll needful rules and regulations for the enforcemnet of his Act.

Refunds.

Section 75.—The Treasurer is authorized to remit, re- nd and pay back all taxes erroneously or illegally as- essed or collected, all penalties collected without authority, nd all taxes that appear to be unjustly assessed or ex- essive in amount, or in any manner wrongfully collected; nd shall make report to The Legislature of Puerto Rico t the beginning of each regular session of all transactions nder this section.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as *shall have been levied on him within the time specified* and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision. . .

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(c) This section shall not affect any proceeding in court nstituted prior to the enactment of this Act.

GENERAL PROVISIONS.
REPEALS.

Section 85.—(a) Income Tax Law No. 43, approved uly 1, 1921, as amended, is repealed as of January 1, 1924.

(b) The parts of Income Tax Law No. 43, approved uly 1, 1921, as amended, which are repealed by this Act hall (except as provided in Section 63 and except as otherise specifically provided in this Act) remain in force for he assessment and collection of all taxes imposed by such ct, and for the assessment, imposition, and collection of ll interest, penalties, or forfeitures which have accrued r may accrue in relation to any such taxes, and for the ssessment and collection, to the extent provided in Inome Tax Law No. 43, approved July 1, 1921, as amended, f all taxes imposed by prior income or excess-profits tax cts, and for the assessment, imposition, and collection of ll interest, penalties, or forfeitures which have accrued r may have accrued in relation to any such taxes. In the ase of any tax imposed by any part of Income Tax Law o. 43, approved July 1, 1921, as amended, repealed by this ct, if there is a tax imposed by this Act in lieu thereof, he provision imposing such tax shall remain in force until he corresponding tax under this Act takes effect under he provisions of this Act.

ections 3220 and 3226 of United States Revised Statutes s Amended by Federal Revenue Act of 1924. (See Sections 75 and 76 (b) of the Puerto Rican Act of 1924).

REFUNDS.

Sec. 1011. Section 3220 of the Revised Statutes, as mended, is reenacted without change, as follows:

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Sec-

retary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

Sec. 1014.—(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for a refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is

begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court ituted prior to the enactment of this Act.

ome Tax Regulations No. 1 Under the Inncome Tax Act of 1924.

Limitations Upon Suits and Proceedings by the Taxpayer.

(Here follows copy of section 76 of the Act).

icle 355—Suits, etc.

Article 355.—Suits for Recovery of Taxes Erroneously lected.—Suit or proceeding for the recovery of any in- e or excess-profits taxes alleged to have been erroneously llegally assessed or collected, or of any penalty claimed ave been collected without authority, or of any sum al- d to have been excessive or in any manner wrongfully ected can be maintained by the taxpayer when the re- ements of either of the following methods of procedure e been fulfilled:

(1) When the taxpayer receives notice from the Treas- r that the income tax has been determined, he may: make a voluntary payment of the amount so determined thout filing an appeal from the Treasurer's determina- of the tax to the Board of Review and Equalization); file a claim for refund or credit with the Treasurer hin four years from the time the tax was paid (see sec- 64 (b)); (c) if the claim is denied by the Treasurer, taxpayer may bring an ordinary action before a court competent jurisdiction to recover the amount so paid.

(2) When the taxpayer receives notice of the determination by the Treasurer of the tax to be paid, he may: (a) file an appeal to the Board of Review and Equalization; (b) if the decision is adverse he may petition for a reconsideration within thirty days; (c) if the reconsideration is denied, he may pay under protest; (d) if payment has been made, he may file a claim for credit or refund with the Treasurer and with the Board of Review and Equalization; (e) within thirty days from the date of payment he may file a suit in the proper court to recover the amount paid under protest. See section 76 (a) and (b).

The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suit or proceeding is required. No suit for the purpose of restraining the assessment or collection of any taxes shall be maintained in any court. The word "restraining" is used in its broad, popular sense of hindering or impeding, as well as prohibiting or staying, and the provision is not limited in its application to suits for injunctive relief. The prohibition of such suits can not be waived by any officer of the Government.

Section 76 does not affect any proceeding in court instituted prior to the enactment of the Act.

Sections 272 and 281 of the Federal Revenue Act of 1924. (See Sections 55 and 64 of the Puerto Rican Act of 1924.)

Overpayments.

Sec. 272.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments,

exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281.

CREDITS AND REFUNDS.

SEC. 281.—(a) Where there has been an overpayment of any income, war-profits or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Commissioner and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that there has been an overpayment of income, war-profits, or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 221 or 237 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.

(f) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

Pertinent Part of Sections 308 and 310 of the Political Code as Amended by Act of No. 75 of August 2, 1923.

"Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, and for the purpose of passing on all claims made by taxpayers in respect to the assessment of their properties and the levying of property and income taxes, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, to be composed of the Treasurer of Porto Rico and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists.....

"Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for purposes of taxation, or to the amount of taxes, or to exemptions from taxation, or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought to its attention....." (Italics supplied.)

APPENDIX B.

Opinions of the Supreme Court of Puerto Rico in the case of Porto Rico Fertilizer Company v. Domenech:

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Associate Justice,

MR. ALDREY.

San Juan, Puerto Rico, November 13, 1935.

Porto Rico Fertilizer Company, a domestic corporation, paid without protest to the Treasurer of Puerto Rico, in the years 1926, 1927, 1928, 1929, 1930, 1931 and 1932, the taxes collected from it as withholding agent of the Virginia-Carolina Chemical Corporation, a corporattion of the United States of America. The payment made in 1929 was so made on the 11th of June of said year. On the 4th of October 1933 Porto Rico Fertilizer Company petitioned the Treasurer of Puerto Rico for the refund of all said taxes because the same had been erroneously collected and paid, alleging that, while from 1924 to 1931 it borrowed money from the Virginia-Carolina Chemical Corporation, all said loans were made in Richmond, State of Virginia, where the money was spent and interest paid on the loans with money that the Porto Rico Fertilizer Company had on deposit with banks in New York, and that the Virginia-Carolina Chemical Corporation has not even had an agent in this island nor a representative or office therein. The Treasurer refused the refunds requested as regards the payments made up to the 11th of June 1929 for the reason that four years had elapsed since said payments were made. He also refused the refund of the taxes paid after said date. Against said decisions of the Treasurer of Porto Rico Fertilizer Company filed suit in the San Juan District Court praying that the Treasurer be ordered to return all the said taxes, alleging the facts hereinbefore set forth. Two payments were made in 1926 and in the complaint there are alleged eight causes of action.

one for each payment made. Said complaint was demurred to on the ground that it did not allege facts sufficient to constitute a cause of action, and the court sustained said demurrer of the defendant because the claim made for the payments to which the first five causes of action refer has been made after more than four years had elapsed. Regarding the payments made after the 11th of June, 1929, which are the payments to which the last three causes of action refer, the court held that it could not order the refund thereof because the payments were not made under protest and because Porto Rico Fertilizer Company should have appealed from the refusal of the Treasurer to return said taxes to the Board of Review and Equalization before it could resort to the courts of justice. Judgment was entered in conformity with said decision and plaintiff took this appeal.

In the brief filed in this court plaintiff acknowledges that the first five causes of action have prescribed, wherefore it limits its argument on appeal to the contention that the judgment is erroneous as to the last three causes of action, alleging that it does not have to make the payments under protest nor to appeal from the Treasurer's decision to the Board of Review and Equalization.

Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section.

The said law, in its Section 76 and under the title "Limitations upon suits and Proceedings by the Taxpayer", provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as

shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made.

On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed.

PEDRO DE ALDREY,
Associate Justice.

OPINION OF SUPREME COURT OF PUERTO RICO.

DELIVERED BY MR. CHIEF JUSTICE DEL TORO.

San Juan, Puerto Rico, July 23, 1936.

This is a suit for the recovery of taxes. Plaintiff, a corporation organized in accordance with the laws of this island, alleges that during the years 1924 to 1931 it borrowed certain amounts of money from the Virginia-Carolina Chemical Corporation, a Virginia corporation having no agent in this island; that the loans were contracted for and the money paid in Richmond, Virginia, and used outside of Puerto Rico in the purchase of materials used by plaintiff in its business, and that the principal as well as interest on said loans were paid in Richmond by means of drafts against funds deposited in New York.

Plaintiff then sets forth eight separate causes of action. The first one, copied literally, reads:

> "6. That on May 20, 1926 plaintiff was notified by the Treasurer of Puerto Rico that said official had assessed in the sum of $786.29 the amount of income tax payable by the Virginia-Carolina Chemical Corporation for interest paid to said corporation by plaintiff during the period of time from July to December, 1924, by virtue of the loans described in paragraph second of this complaint, notifying this plaintiff at the same time that it should pay said amount as withholding agent of the said Virginia-Carolina Chemical Corporation, and plaintiff alleges that on the 19th of June, 1926 it paid said sum of $786.29 to the Treasurer of Puerto Rico for the aforesaid taxes."

The remaining causes of action refer to the years 1925, 1926, 1927, 1928, 1929, 1930 and 1931, payments having been made respectively in 1926, 1927, 1928, 1929, 1930, 1931 and 1932.

Plaintiff further alleges that for the reason that neither the Virginia-Carolina Chemical Corporation nor the loans

in question ever had a situs in Puerto Rico, the collection of the tax on income earned and received outside of Puerto Rico was illegal; that in accordance with Section 75 of Law No. 74 of 1925 the Treasurer of Puerto Rico is authorized to return said taxes, and that on October 3, 1933, plaintiff asked the Treasurer for the return of said taxes and the Treasurer on the following day refused said petition as regards the payments referred to in the first, second, third, fourth and fifth causes of action, basing said refusal on subdivision (b) of Section 64 of said Law No. 74 of 1925, and on the 30th of the said month of October, 1933 he denied said petition also with regard to the payments referred to in the sixth, seventh and eighth causes of action.

Plaintiff prayed for judgment ordering the refund of the said taxes with interest from the date they were paid.

Defendant demurred to the complaint alleging lack of facts to constitute a cause of action, and the court sustained said demurrer granting plaintiff leave to amend its complaint.

Plaintiff petitioned for a reconsideration and judgment on the pleadings in case the reconsideration were denied. The District Court affirmed its original opinion and rendered judgment dismissing the complaint. And it is against this judgment that this appeal was taken. The assignment of errors, copied literally, reads as follows:

> "1. That the District Court erred in deciding that the complaint does not state facts sufficient to constitute a cause of action.
>
> "2. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization before making payment of the amounts claimed, and/or that said plaintiff should have paid said taxes under protest, and in deciding that because it did not do so said plaintiff has no cause of action.
>
> "3. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization from the refusals of the Treasurer of October 4 and 30, 1933, with

regard to the claim for refund filed by plaintiff with said official, and in deciding that because said appeals were not instituted plaintiff has no cause of action."

In its brief plaintiff-appellant admits that its first five ses of action have prescribed and confines itself to argu- its case as to the sixth, seventh and eighth causes of ion. The Treasurer filed his brief and after hearing case the appeal was decided by this court on November 1935, affirming the judgment appealed from.

In the opinion on which the judgment is based the court ted in part as follows:

"Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section. The said law, in its Section 76 and under the title 'Limitations upon suits and Proceedings by the Taxpayer', provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by Law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and

the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made. On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

For the reasons set forth plaintiff requested this court to modify "the opinion rendered in this case sustaining that the doctrine established in the cases of *American Colonial Bank of Porto Rico* v. *Gallardo* and *Soto Gras* v. *Domenech* has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforesaid cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of avoiding serious confusion regarding the construction of the law and the authorities applicable and to prevent serious confusion regarding the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded in good faith for the protection and defense of their rights in accordance with the decisions of this court in the aforementioned cases."

By order of January 14th last the court reconsidered judgment of November 13, 1935, and set a new hearing February 18, 1936. Both parties maintained their re-ctive positions and Mariano Acoste Velarde, Esq., inter-ed in the case as amicus curiae, alleging, in fact, that Puerto Rico "the payer of income taxes has the right, sing under Law No. 74 of 1925 and its regulations, to ain the refund of what is unduly paid, within four years er income taxes are erroneously paid, by means of a im for refund and the proper judicial action, even if the ment was not made under protest."

The ultimate facts to be considered for the decision of s appeal are, therefore, that plaintiff, on October 3, 1933, d with the defendant Treasurer three claims for refund income taxes that it had paid without protest in 1930, 1 and 1932; that the Treasurer denied said claims on tober 30, 1933 and on November 3, 1933, plaintiff ap-led from said denial to the District Court of San Juan. This being so, since the taxes paid correspond to and payments thereof were made after the year 1925, the e is governed by Law No. 74 of 1925.

Section 75 of said law authorizes the Treasurer to remit, und and return any taxes erroneously or illegally as-sed or collected and penalties collected without authority, any tax that appears to have been unjustly levied or for excessive amount or for any reason erroneously lected.

The authorization cannot, in fact, be more ample. The easurer acts by himself. He is called upon to judge the rits of each claim. By said Section 75 he is only rged with the duty of rendering a report to the Legisla-e of Puerto Rico, at the inception of each regular ses-n, of all the transactions carried to effect by him in the rcise of said authorization.

The taxpayer is called upon to render his income tax urn and, as soon as practicable after the filing of said urn, the Treasurer of Puerto Rico shall examine the ne and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasurer shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalizaion stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76 (a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

> "(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treas-

urer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

oes this subdivision (b) mean that after the Treasurer s the claim and said denial is affirmed by the Board im for refund has to be filed, and if the Treasurer es it appeal again to the Board in order to be able to t to the courts of justice?

uch is the meaning, at first glance, of the terms of aw itself, and we so decided in the opinion rendered as nds for the judgment which was made ineffective by rder of January 14th last.

evertheless, a careful consideration of the matter car- us to the conclusion that it is not possible that such was ntent of the legislator. Why such duplicity? If the surer denies and the Board affirms his denial and the ayer pays under protest, why resort again to the Treas- and why appeal again to the Board?

his court had already said in the case of *American nial Bank of Porto Rico* v. *Domenech, Treasurer*, 43 . R. 889, 891: "We also agree with appellant that, ter appealing to the Board of Review and Equalization xpayer pays under protest, it is not necessary, once nent is made, to resort to said Board. The legislative t was to grant a cause of action after payment under est. Nevertheless, when drafting the said opinion in case, our previous opinions were overlooked and when ttention was called to that oversight a reconsideration granted and the case was reopened for a new discussion decision of the issues of the same."

t is therefore clear that when the taxpayer, feeling ieved by the income tax levied by the Treasurer, files laim with said official and his claim is denied and he als to the Board, which also decides the case against and he then pays under protest, he may, within the term irty days fixed by Law No. 74 of 1925, Section 76, first graph, resort to the courts of justice without any other

preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey* v. *Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

> "It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is

omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés* v. *Treasurer*, 30 P. R. R. 220, *McCormick* v. *Bonner*, 44 D. P. R. 432, cited by the us curiae, are not applicable because they are based he repealed law of 1919.

Therefore, under any phase that the case is considered, judgment appealed from should be affirmed.

We would consider this opinion terminated if the ques- had not been brought up and discussed amply as to the uence that the decisions of this court in the cases of erican Colonial Bank v. *Domenech, Treas.*, 43 D. P. R. , and *Soto Gras* v. *Domenech, Treasurer*, 45 D. P. R. 940, y and should have in the decision of this case.

The first of said cases has been cited and relied upon on same question that the taxpayer who has filed a petition h the Treasurer, has appealed to the Board and has paid der protest, is not required to file a petition for refund th the Treasurer and appeal to the Board again before may resort to the courts of justice. But that is not the estion that we should now decide, but the following:

Notwithstanding the fact that this is a case of income xes, this court decided that, in accordance with Law No. 8 1927 providing for payment of taxes under protest, the rm within which the taxpayer could file suit was one year, d further said:

> "Section 3 of Law No. 8 provided a manner of payment and a right of action which were prospective and excluded previous methods. So that, a previous law providing for the filing of suit within thirty days after the decision of the Board of Review and Equalization was necessarily repealed." *American Colonial Bank* v. *Domenech*, 43 D. P. R. 890, 891.

Undoubtedly the court referred to subdivision (a) of Section 76 of the Law No. 74 of 1925.

In the second case, that is, the case of *Soto Gras, supra*, this court stated in part as follows:

> "After rendering our opinion in the above entitled case, appellant The People of Puerto Rico filed a motion for reconsideration. Said motion was duly heard and is now before us. Inasmuch as other questions have been sufficiently discussed or decided in our original opinion or in other decisions of this Court, the only question that should be considered is whether the San Juan District Court lacked jurisdiction because the amount claimed by plaintiff was less than $500 and because the suit should have been filed in a municipal court. The Government bases his contention on the fact that Section 76 of Law No. 74 of 1925 (page 401), in accordance with our opinion in the case of *American Colonial Bank* v. *Treasurer*, 43 D. P. R. 889, has been repealed by Law No. 8 of 1927 (Page 123) as regards payment under protest. In accordance with the law of 1925 it was clear that the taxpayer had to file his complaint in a district court. Nevertheless, if that law was repealed, the general provisions of law were applicable. We will assume for the time being, that up to 1925 a taxpayer had to file his claim for refund of taxes amounting to less than $500 in a municipal court. Our decision in the case of *American Colonial Bank* v. *Treasurer, supra*, was that the questions of procedure provided for in the law of 1925 had been abrogated by the law of 1927. We were not dealing with the question of jurisdiction. Therefore, we are inclined to agree with appellee's contention and with appellant's suggestion that both laws could co-exist regarding the question of jurisdiction if the later law did not show the intention to grant jurisdiction to a municipal court. If both laws may subsist, then the intention of the legislature of requiring that a taxpayer resort to a district court was perfectly clear in the law of 1926."

It was insisted that the District Court had jurisdiction. Both decisions were accepted and applied by the Circuit

Court of Appeals for the First Circuit as holding that Section 76 of Law No. 74 of 1925 has been repealed by Law No. 8 of 1927, and in the case of *Domenech* v. *Verges*, 69 F. (2d) 714, 716, said court stated as follows:

> "It is contended by counsel for the appellant that Act No. 8 of the Laws of 1927, providing for the recovery of taxes paid under protest, does not apply to the recovery of income taxes paid under protest; that it was a substitution for a general law enacted prior to the imposition of income taxes; and that, while it expressly repealed Act No. 9, approved June 23, 1924, and also Act No. 84, approved August 20, 1925, which acts provided generally for the recovery of taxes paid under protest, since it did not expressly refer to the Income Tax Act of 1924 approved August 6, 1925, in its repealing section, it should not be construed as repealing or modifying section 76(a) or (b) of that act relating to the recovery of income taxes paid under protest, though it repealed all conflicting laws or parts of laws.
>
> The Supreme Court of Puerto Rico (however, in the case of *American Colonial Bank of Porto Rico* v. *Juan G. Gallardo*, 43 D. P. R. 889 (Spanish Edition) decided July 26, 1932, and in the case of *F. Soto Gras* v. *Domenech, Treasurer*, in an opinion handed down December 20, 1933, on a motion for reconsideration), has held that the method of procedure provided for the recovery in section 76 of the Income Tax Act of 1924 of income taxes paid under protest, was repealed by Act No. 8 of the Laws of 1927.
>
> The interpretations of local law by the Supreme Court of Puerto Rico, unless clearly wrong, are followed by this court. The insular court is in a better position to interpret the intent of the local legislature than this court, and we are inclined to follow its construction in this instance, *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299, 36 S. Ct. 109, 60 L. Ed. 293; *Cardona* v. *Quiñones*, 240 U. S. 83, 88, 36 S. Ct. 346, 60 L. Ed. 538; though we think Act No. 8 of the Laws of 1927 may be susceptible of another reasonable interpretation."

If such a construction subsists, everything we have herein stated and decided in this opinion by application of Section 76 of Law No. 74 of 1925 would fall by its own weight.

We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of *American Colonial Bank, supra,* affirmed, but which was not really relied on with all its consequences in the other case of *Soto Gras, supra,* since the jurisdictional ruling established in the special law and not that of the general law was finally applied.

Our grounds for reaching the aforesaid conclusion are that Law No. 74 of 1925 is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest, especially when said general law contains a repealing clause which reads:

> "Section 6. Act No. 9 of June 23, 1924, and Act No. 84 of August 20, 1925, are hereby repealed, as well as all laws or parts of laws in conflict herewith: Provided, That any act, proceeding or right born under the protection of the laws hereby repealed, shall continue so protected by the provisions thereof, until its termination." (Laws of 1927, p. 124.)

The laws expressly repealed, i. e., No. 9 of 1924 and No. 84 of 1925, were also laws of a general character, as were Law No. 17 of 1920, repealed by Law No. 9 of 1924, and Law No. 35 of 1911—the first law on the matter—which was repealed by Law No. 17 of 1920.

The general system relative to suits in cases of taxes paid under protest being in force, and laws complete in themselves having been approved, the clear purpose of the legislator was that both laws should subsist within their own scope of action. If any doubt should subsist it would be dispelled by the action of the legislature itself in this year 1936 amending said section 76 of Law No. 74 of 1925 by adding thereto the following proviso: "Provided, that once the case is decided

upon a first reconsideration, no other proceeding shall be entertained by the Board, with the exception of what is provided in subdivision (b) of this section", which implies that it considered said section to be in force, notwithstanding the general law that it enacted in 1927 regarding payment of taxes under protest. See the cases of *Kessler* v. *Domenech, Treasurer,* 49 D. P. R. 196, and *Sucesión Puente* v. *El Pueblo,* 19 P. R. R. 560.

Wherefore, the motion for reconsideration is hereby dismissed and the judgment appealed from should be affirmed.

EMILIO DEL TORO,
Chief Justice.

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Chief Justice Mr. DEL TORO.

San Juan, Puerto Rico, February 26, 1937.

The reconsideration of the judgment rendered in this case on the 23d of July, 1936, has been prayed for.

It seems advisable to remember that this appeal was originally decided by judgment of November 13, 1935, affirming the judgment appealed from, and that it was appellant itself who petitioned this court to modify "the opinion handed down in this case holding that the doctrine established in the cases of *American Colonial Bank of Puerto Rico* v. *Gallardo,* and *Soto Gras* v. *Domenech,* has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforementioned cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of preventing serious confusion as to the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded for the protection and defense of their rights in

accordance with the decision of this court in the afore
tioned cases."

Realizing the necessity of establishing a clear final
on the matter, this court decided to reconsider and di
consider its said judgment of November 13, 1935, and de
to hear the parties again, as it did hear them amply, in
ing and orally, and also heard the amicus curiae Ma
Acosta Velarde.

And it was by virtue of said careful study by the a
neys and by the court that the latter finally came to face
the unavoidable question of a written provision of law
had to be made effective. Such is the gist, on a final anal
of the lengthy opinion of which appellant now compl
It was on appellant's own request that the question
finally cleared, so that the injuries to which said appe
party refers in its motion for reconsideration may not
tinue to be occasioned.

We realized the difficulty of the question when we f
that it had been decided to the contrary by the Circuit
of Appeals for the First Circuit, and we so stated i
said opinion. 50 D. P. R. 405, 417.

Appellant now contends that the decision of the Ci
Court constitutes a rule of *stare decisis* which should b
cepted and followed. It might be so but is not, in our j
ment, under the concurring circumstances.

In the first place, the time elapsed is too short fo
unassailable rule of *stare decisis* to have arisen; in the
ond place, in following the decisions of this Supreme
the District Court acted in a manner that does not reve
own conviction but deference to the local tribunal, and i
third place, the question is one of written law and one
law has been purified it is not susceptible of construc
Courts have no legislative powers.

The reconsideration prayed for should be denied.

EMILIO DEL TOR
Chief Ju